Case No: 93/6224/Y4 & 93/6225/Y4

Neutral Citation Number: [1997] EWCA Crim 556
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London WC2

Date: Monday 24th February 1997

B E F O R E :

LORD JUSTICE JUDGE
MR JUSTICE KAY
and
MR JUSTICE NELSON

Between:
- - - - - - - - - - - -

R E G I N A

- v -

MICHAEL PATRICK DOHERTY
and
SUSAN McGREGOR

- - - - - - - - - - - -
Computer Aided Transcript of the Stenograph Notes of
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(Official Shorthand Writers to the Court)
- - - - - - - - - - - -
MR G FORD appeared on behalf of the Appellant Doherty
MISS V BAIRD appeared on behalf of the Appellant McGregor
MR C MITCHELL appeared on behalf of the Crown
- - - - - - - - - - - -
JUDGMENT

LORD JUSTICE JUDGE: On 11th October 1993 in the Central Criminal Court before the Common Sergeant, His Honour Judge Denison QC and a jury, the appellants were convicted of the murder of Sheila Taylor in October 1989 and of causing grievous bodily harm and robbing Ezio Fumagalli in February 1990. For murder both were sentenced to life imprisonment. Concurrent sentences of six years' imprisonment and four years' imprisonment were imposed on Doherty for grievous bodily harm with intent and robbery respectively. The sentences on McGregor for these offences were four years and three years' imprisonment concurrent.

They appeal against conviction with leave of the full court.

The death of Sheila Taylor was reported to the emergency services at 11.15 pm on 27th October 1989. An ambulance arrived at 85b Victoria Road, Kilburn, London, shortly afterwards. The appellant and another man were found in a back room at that address and Sheila Taylor was lying on a mattress. She appeared to be dead. McGregor told the ambulance men that they had found her in that state. Unsuccessful efforts were made to resuscitate Mrs Taylor both in the ambulance and at the hospital.

A routine postmortem was carried out on 3rd February 1989. It was concluded that Mrs Taylor had died of natural causes, although an internal examination showed slight localised bruising on the left side of the sternomastoid muscle which might give rise to a slight suspicion of strangulation. No other injuries of any significance were discovered.

At the time of Mrs Taylor's death Ezio Fumagalli lived in a basement flat at 85 Victoria Road. The appellants and a man called James, otherwise Cowboy Casey, together with Mrs Taylor, lived on the ground floor. The deceased had moved into the flat about ten days before her death. All the occupants were said to be heavy drinkers. On 27th October Fumagalli said he spoke to Mrs Taylor between about 5 pm and 6 pm. She had invited him to her flat. He followed her into a room in which there was a wardrobe containing a jacket belonging to Doherty. There was a pension book in the jacket of the pocket. She showed the book to Fumagalli. He did not see or could not recall the name shown on the book but when Mrs Taylor spoke to him about it she seemed upset. She put the pension book back into the jacket, and the jacket into the wardrobe, and Fumagalli then returned to his own flat.

At about 7 pm that evening when Fumagalli was leaving his flat he heard shouting and screaming in the ground floor flat. He recognised the voices of both appellants. He decided to go and see what was happening. He went into

the back room. There he found a number of people standing about the mattress on which Mrs Taylor was lying. Fumagalli thought she was dead. He asked the appellants what had happened. Both said that she was dead and that she had been sick. Having taken two girls who had been with him to a bus stop, Fumagalli then visited a friend and returned to his flat at about midnight.

The next day Doherty, in the presence of McGregor, told Fumagalli that they had found Mrs Taylor dead. A couple of days later when Fumagalli saw Doherty on his own, he told Doherty that on the date of her death Mrs Taylor had shown him the pension book. Doherty rejected the suggestion that he had taken it. In cross-examination at trial it was put to Fumagalli that the pension book had been in Casey's jacket but he did not think that that was right.

James Casey had moved to a disused warehouse shortly before the arrival of Mrs Taylor at the ground floor flat. On the night of her death the appellants went to his warehouse. Doherty was in a bit of a state, walking around, saying: "I've done an awful thing Cowboy." He said something about a pension book and then: "I caught her by the neck and she turned blue" or "Caught her by the neck and she was gone and I tried to give her the kiss of life".

On 9th November 1989 McGregor, accompanied by a man, went to the West Hampstead Post Office with an application form requesting the post office at which sickness benefits were to be drawn to be changed to West Hampstead. The application form was in the name of and purported to be signed by Sheila Taylor. The form was dated 6th November 1989. There were a number of spelling mistakes. The form was handed in at the post office with a pension book. The fingerprints of both appellants were found on it. McGregor had completed the form.

In December 1989 Fumagalli left his address at Victoria Road, but on 19th February 1990 he returned to collect some clothes. He found the appellants there together with Casey. The appellants took hold of him and dragged him into a back room. McGregor took his boots, wallet, watch and ring. He was pushed onto a settee, pulled up again and then both appellants punched him in the face. Doherty pushed him back onto the settee. In the process his leg was broken. When he screamed with pain the appellants laughed at him. Casey then laid him on the settee, but Doherty started to twist his other leg. Casey stopped Doherty. However he then left to make a telephone call. Doherty then turned Fumagalli face down, put his head on a pillow and asked McGregor to help him. She agreed. They pushed onto the pillow forcing his face onto the settee. He lost consciousness. He was revived by Casey slapping his face.

He was very frightened. He did not tell the police what had happened. He went to hospital. When Fumagalli arrived he was not wearing any shoes. His left femur was fractured. His lip was cut. There was a laceration over his right eye. He was detained in hospital for about three weeks. He had to use crutches for two years.

It was suggested to him in cross-examination that Casey rather than Doherty had attacked him and that Doherty had pulled Casey away. He denied it. He asserted that McGregor had been personally involved in the attack.

Casey, of course, had witnessed part of the attack. He came into the room and saw Doherty holding Fumagalli by the neck. Fumagalli passed out. Casey pulled Doherty off. The appellants both left taking some of Fumagalli's clothes with them. Before he left to make a telephone call Casey did not see Doherty use a pillow.

Much later, on 27th August 1992, McGregor was under arrest at Kilburn Police Station. She was drunk. While there she asserted that while she and Doherty had been living together at 85B Victoria Road, he, Doherty, had suffocated an old woman called Sheila Taylor and taken her pension book. She had called the ambulance. When sober she was released. On 28th August she went back to the police station at Kilburn demanding to see a police officer. Again she was drunk. She said that Doherty had suffocated an old lady about two years ago at 85b Victoria Road by holding a pillow over her face. He had taken her pension book. She had been present at and witnessed the struggle. After Mrs Taylor was dead Doherty told her to say that they had found her dead.

At trial, following a submission on behalf of Doherty, these interviews were excluded, leading counsel for McGregor adopting a neutral view. From Doherty's point of view the evidence was inadmissible but potentially very dangerous; from McGregor's, although her comments purported to exculpate her and implicate Doherty alone, they were wholly inconsistent with the case being advanced by her that she was not present and knew nothing of the death of Mrs Taylor. In the result these conversations, although before the Common Serjeant when considering the question of severance, were not put before the jury, an omission for which counsel for McGregor are criticised.

Shortly after leaving the police station McGregor spoke to Patrick O'Shaughnessy who had come to know both appellants and was friendly with Doherty. She told O'Shaughnessy that the police were making enquiries about the death of Mrs Taylor and that he should in effect keep his head down. O'Shaughnessy spoke to Doherty and asked Doherty whether he had killed Mrs Taylor. Doherty admitted that he had, but went on that he could not be caught for it

because it all happened so long ago and she had been buried. In his statement to the police O'Shaughnessy explained that Doherty had said "that there had been an argument and he had smothered the woman".

On 19th August 1992 the appellants were arrested in connection with Mrs Taylor's benefit book. They were interviewed at length, and separately. Doherty denied cashing the benefit book. McGregor denied ever trying to use the pension book to obtain cash. Both explained that on the night of Mrs Taylor's death they, together with Fumagalli, had returned home at about 11 pm and found that Mrs Taylor was dead. McGregor adamantly denied that she was covering up for or protecting Doherty. When seen privately by her solicitor she maintained these denials.

A few days later Mrs Taylor's body was exhumed. A further postmortem was carried out by Dr Rouse. During the course of this postmortem he dissected the neck area. He found bruising on the back of the tongue, to the thyroid cartilage and to the area to the side of the epiglottis. He also found a fractured hyoid bone. His findings were consistent with manual strangulation by a firm grip to the front of the throat and pressure from the thumb and fingers, and he concluded that the immediate cause of death was pulmonary oedema caused by compression of the airways as a result of strangulation or suffocation or both.

On 1st February 1993 McGregor went into the Green Man at Harleston. She was very drunk. She used the telephone. Then she asked the barmaid to take over the phone. The barmaid discovered that the police were on the other end. When she asked McGregor what the trouble was about she said something about her benefit book having been stolen. When police officers attended the Green Man they found McGregor very drunk, slumped at a table. When they left the premises she said "I want to admit to the murder of Sheila Taylor." In answer to questions she said she had done it in 1989 at 85 Victoria Road, Kilburn. She was arrested for being drunk and incapable and taken to a police station. On the way she was asked how she had killed Mrs Taylor. She said that she had suffocated her because she was too old.

While the appropriate arrangements were taking place for her detention in custody she said to the custody officer that she had killed someone, she was guilty of it and she was sorry. She was placed in a police cell. Eventually the custody officer decided that she was sober enough to be released. He explained that he would formally caution her for being drunk and then let her go. She then said "I want to tell you I admit to murder." She said it was the murder of

Sheila Taylor in 1989 at Victoria Road. An application to exclude these verbal admissions on the basis of the appellant's drunkenness failed. No arguments based on her inherent unreliability arising from a psychiatric condition was advanced. The Common Serjeant ruled that the fact of her drunkenness and its effect on the reliability of her admissions were matters for the jury. We agree with this ruling and no criticism of it was pursued before us. However, it was argued on behalf of McGregor that the decision to admit these conversations made it imperative that her admissions made in interview in August 1992 should have been put before the jury.

On 2nd March 1993 both appellants were arrested. During the course of her interview McGregor was asked to write down the wording found on the post office application form handed in at West Hampstead Post Office in November 1989. She did so, making the same spelling mistakes as those which had been found in the original. Nevertheless she denied writing the original form. When asked about her previous admissions to police officers she said she could not remember making them and doubted whether she had. She denied knowing anything of the murder of Sheila Taylor and maintained that she and Doherty found her dead. This was to be her case at trial.

Doherty was interviewed. He did not answer most of the questions but again asserted that he had not touched the post office application form. As already indicated the fingerprints of both appellants were found on the form.

At trial McGregor's instructions to counsel were that she knew nothing of Mrs Taylor's death. She made no allegation which suggested that Doherty had been involved. I shall read part of her proof dealing with the relevant moments:

> "I believe we were drinking with Ezio for over an hour. All of us were drinking and some time thereafter we came out of his flat to go up to ours to decide what we were going to do that evening. I can't exactly recall who went in first. It was more or less the three of us who found Sheila on the floor. I held her and shook her while Michael Doherty sat on the sofa and watched what I was doing and was waiting to assist in any way he could. I shook her. She did not get up. I believe that then I became a bit hysterical as she did not respond. I remember shouting that an ambulance should be called. ...
> I totally deny being involved directly or indirectly in an assault on Sheila Taylor or in any way covering up for Michael Doherty. Both Michael and myself felt that we were in some way responsible for her death, not because we caused it. If we had been with her instead of with Ezio we may have been able to get her assistance in time."

She went on:

> "My explanation for the wild statements I have made at various times is the frustration I have about the incident. It was because of Mike that I went down to join Ezio that evening. In some way I feel

> that if Mike allowed me to stay upstairs Sheila would have been living today. When we have quarrels I blame him for Sheila's death. It is purely a moral responsibility and it cannot be taken any further."

The psychiatric report from the prison suggested that she did not suffer from psychiatric illness. Relevant parts of the report read that after two interviews with McGregor:

> "On each occasion I found no evidence of psychiatric illness. She was fully conscious, alert, in touch with surroundings.
>
> Dress, movement, speech normal, mood appropriate. Thinking and intellect unimpaired.
>
> No evidence of delusions or hallucinations or ideas of reference.
>
> She does have scars on arms indicative of impulses, when upset, to self-harm. This added to various tattoos with initials of previous boyfriends, suggests a degree of emotional vulnerability."

Towards the bottom of the first page in relation to social matters her social activity is described as:

> "Mainly drinking."

The opinion is expressed:

> "Ms McGregor is free of psychiatric illness and is fully fit to plead.
>
> The cuts on her arms indicate emotional instability."

Then there is a repetition of the reference to the tattoos with this conclusion:

> "This would indicate she would be vulnerable to coercion by people who show her affection."

Those documents formed the basis of McGregor's instructions to trial counsel.

At trial neither appellant gave evidence. The case presented on behalf of each in accordance with instructions was that neither of them had killed Mrs Taylor nor injured and robbed Fumagalli. Each appellant called a pathologist. Both regarded the cause of Mrs Taylor's death as "uncertain" or "unascertainable". Nothing in this appeal turns on the way in which the issues arising from it were left to the jury. Nevertheless the question whether the Crown could prove that Mrs Taylor's death was the result of homicide was not unreasonably regarded by counsel for the appellants and in particular McGregor as a highly significant feature of the case, and one which could with every justification be advanced to the jury as material which should lead them to conclude that there was a reasonable doubt whether Mrs

Taylor had been murdered at all. This feature of the evidence is therefore material to the contention that counsel for McGregor failed to advise her with sufficient forcefulness that she should give evidence on her own behalf.

We can now consider the grounds of appeal advanced on behalf of each appellant. At the beginning of the trial it was submitted that count 1 (murder) should be severed from counts 2 and 3 (grievous bodily harm with intent and robbery). The judge refused the application. His decision was criticised on behalf of both appellants.

Under the Indictment Rules 1971, rule 9 provides that two or more counts may properly be joined in an indictment "if the charges are founded on the same facts or form or are part of a series of offences of the same or a similar character." If properly joined the court may nevertheless order severance under section 5(3) of the Indictments Act 1915. The language of rule 9 is to be construed very widely. Two offences are capable of forming a series of offences. (Ludlow v Metropolitan Police Commissioner [1971] AC 29).

In Ludlow the indictment alleged attempted theft on 20th August 1968 from one public house in Acton and robbery on 5th September 1968 from another public house in Acton. Applying the principle derived from the decision of this court in R v Kray [1970] 1 QB 125, Lord Pearson, with the agreement of each member of the House of Lords, said:

> "...the Court of Appeal decided that two offences could constitute a 'series' within the meaning of the rule, and I agree with their decision and reasons.
> ...
> ...there was in the present case a sufficient nexus between the two offences to make them a 'series of offences of a similar character' within the meaning of the rule. They were similar both in law and in fact. They had the same essential ingredient of actual or attempted theft, and they involved stealing or attempting to steal in neighbouring public houses at a time interval of only 16 days."

In effect therefore rule 9 was neither confined to consideration of the legal characteristics of the alleged offences nor limited to factual characteristics. Both the law and the facts had to be considered.

Subsequently, in Director of Public Prosecutions v P (1991) 2 AC 447 when answering the question "Where a defendant is charged with sexual offences against more than one child or young person, is it necessary, in the absence of striking similarities, for the charges to be tried separately?" Lord Mackay of Clashfern provided the answer "No", adding: "provided there is a relationship between the offences of the kind I have just described." In argument attention was focussed on this observation in DPP v P. It was urged that it followed from the answer given by Lord Mackay that separate trials should be ordered where the evidence of one complainant of sexual abuse was not admissible to support

the complaint of another complainant contained in a different count. The argument perhaps overlooked the full text of Lord Mackay's speech which included this passage, plainly referring to his comment about the relationship between the offences:

> "This relationship, from which support is derived, may take many forms and while these forms may include 'striking similarity' in the manner in which the crime is committed, consisting of unusual characteristics in its execution, the necessary relationship is by no means confined to such circumstances. Relationships in time and circumstances other than these may well be important relationships in this connection."

In reaching his decision in the present case the Common Serjeant applying what he understood to be the principles in DPP v P expressly concluded that although the allegations contained in counts 1 and counts 2 and 3 contained no features of striking or unique similarity, there was nevertheless a degree of similarity between the allegations in counts 2 and 3 to be capable of providing support for the allegation in count 1. Accordingly the application for severance was refused.

This conclusion was decisively endorsed in R v Christou [1996] 2 WLR 620. After considering conflicting authorities as well as the effect of the answer given by Lord Mackay to the second question in DPP v P, the House of Lords confirmed that the proper application of rule 9 permitted the trial judge to order that charges should be tried together even when the evidence to support each charge was not mutually admissible. Although Christou was concerned with sexual abuse of children, and we recognise a tendency in the authorities to compartmentalise the decisions between sexual and other allegations, we do not understand the decision in Christou to be limited to sexual cases and we can see no reason why it should. As the counts in Christou were properly tried together they must have been properly joined in accordance with rule 9. Guidance was given about some of the factors which might need to be considered, varying from case to case, "but the essential criterion is the achievement of a fair resolution of the issues. That requires fairness to the accused but also to the prosecution and those involved in it."

We shall briefly summarise the material available to the judge at the time when he gave his ruling. On the basis of the committal papers the prosecution case in relation to murder was that the male defendant grabbed the deceased by the throat and that either both of them or the female defendant placed a pillow over the deceased's face. She was asphyxiated. Death was caused either by manual strangulation, or smothering, or a combination of both. The case on

counts 2 and 3 was that the victim, an important witness for the prosecution on count 1, was grabbed by the throat by the male defendant who assaulted him in other ways and inter alia broke his leg, and that thereafter his face was pushed down into a settee and a pillow forced onto the back of his head by, he thought, both defendants together. Both attacks took place at the same address. The motive for each was robbery. Even if the evidence of this victim was not capable of providing support for the allegation against the appellants in count 1, as there was a sufficient nexus between them, the charges were properly joined within rule 9 of the Indictments Rules 1971.

Mr Ford argued on behalf of Doherty that the decision to refuse severance led to unfair and improper prejudice to the appellants. Miss Baird on behalf of McGregor adopted the same argument and pointed to discrepancies between the two incidents and uncertainties about precisely what happened to Mrs Taylor, and the role played by her client in the attack on Fumagalli. We have reflected on these matters.

The question of severance was a matter for the trial judge. We agree with his conclusion that the three counts should be tried together, and certainly there is no basis for interfering with it. Subsequently in his summing-up he provided the jury with accurate and fair directions about how they should approach the task of reaching separate verdicts on each of the counts before them, and any possible relevance that the attack on Fumagalli might have to the murder of Mrs Taylor. No improper prejudice flowed from his decision.

The second ground advanced on behalf of Doherty concerned the way in which the Common Serjeant directed the jury about their approach to his good character. The jury were directed that it was a "matter that goes to his credit." They were also told "Bear it in mind when you are considering whether he is guilty or not guilty of these offences."

The criticisms of this direction have to be considered in context. The judge had to take account of two specific features of the case developed at the trial. Unlike Doherty it could not be said of McGregor that she should be treated as someone of good character, and Doherty himself did not give evidence. Although brief, the judge's formulation of the relevant principles was sufficient to alert the jury to the possible relevance of Doherty's good character. There was no misdirection.

The next ground of appeal, advanced on behalf of both appellants, arises from the late disclosure by the Crown of the fact that Fumagalli had previous criminal convictions. To describe the disclosure as "late" is an understatement: it

never took place at trial, and only emerged after this appeal was adjourned, Mr Ford having concluded his submissions on behalf of Doherty, in circumstances to which we shall come in a moment.

The explanation for this otherwise baffling oversight is simple. Fumagalli's previous convictions were recorded under name "Fugalli", and so were not thrown up during the usual pretrial investigations into the antecedents of the witnesses for the prosecution. As previous convictions of other witnesses, including in particular Casey, were disclosed, we see no reason to conclude that the failure to disclose Fumagalli's convictions was deliberate or the result of bad faith by the prosecution. We immediately admitted the evidence of Fumagalli's criminal record and heard argument about the possible impact of this evidence and the irregularity on the safety of these convictions.

Without minimising them, Fumagalli's convictions are not of major importance. In April 1989 he was convicted of shoplifting and fined. In May 1989 he was convicted of four offences of obtaining property by deception and made subject to a community service order. Doherty was a man of good character and his counsel could have cross-examined Fumagalli about his previous convictions with impugnity, a course adopted by him in relation to Casey who had a substantial record of serious crime. Doherty apparently instructed his counsel that he knew that Fumagalli frequently carried and sought to involve Doherty in the misuse of stolen credit cards. We suspect that counsel decided that to investigate these questions at all might have been counterproductive, but we do not propose to dispose of the argument by reference to those instructions. To the extent that reference to Fumagalli's convictions affected McGregor, she would have been able to derive whatever advantages might ensue from cross-examination of Fumagalli on behalf of Doherty.

Fumagalli's evidence was of particular importance to the allegations in counts 2 and 3 in which he was undoubtedly the victim of very serious violence. It was also relevant in relation to the timing of Mrs Taylor's death and whether the pension book shown to him by Mrs Taylor before her death was located in Doherty's jacket. Both Mr Ford and Miss Baird argued that if the convictions had been known at trial both the application for severance and an application during the course of the trial for the discharge of the jury on the basis of clashes between the evidence of Casey and Fumagalli would have been more likely to succeed.

We accept that on issues such as the timings of death and Fumagalli's general standing, these convictions would

have damaged his credibility. However, we are unable to see how his previous convictions could have formed the basis for concluding that he might have been falsely attributing his own injuries to the appellants rather than Casey. In this context we have examined Miss Baird's argument, founded on Casey's evidence, exculpating McGregor from the attack on Fumagalli and the possible effect on the mind of the jury if they had known that Fumagalli as well as Casey had a criminal record. They might, she argued, have preferred Casey's evidence, and if so they would have acquitted McGregor on counts 2 and 3 and this would have had a significant impact on their approach to count 1. We would have been more impressed with this argument if it were not apparent that on his own evidence Casey was not present throughout the attack on Fumagalli. He did not suggest that he had witnessed the entire incident. In any event the real issue was whether Fumagalli was protecting Casey and wrongly implicating the appellants. Although the differences between their respective accounts were rightly drawn to the attention of the jury, we are unable to accept that, properly analysed, Fumagalli's convictions undermined his evidence about the identity of his assailants, or the manner in which he was attacked, or the time of Mrs Taylor's death, and his evidence about the whereabouts of her pension book was given significant support by the independent evidence identifying those involved in the misuse of this book after Mrs Taylor's death.

We have reflected on this newly disclosed material in the context of the evidence in the case and the issues which arose at trial. In accordance with the principle in Callaghan [1989] 88 Cr App R 40, we have decided to test our own view by reflecting on the possible impact on the trial jury of knowledge of Fumagalli's convictions. Having done so we have concluded that the undoubted irregularity which took place in this case does not render these convictions unsafe.

The final ground of appeal pursued by Miss Baird fell within R v Clinton [1993] 97 Cr App R 320 and R v Fergus [1994] 98 Cr App R 313, that is incompetent or inadequate legal representation. The way in which this ground was pursued caused us considerable concern which we must explain in detail.

It will be remembered that the appellant was convicted in September and sentenced in October 1993. On 9th November grounds of appeal prepared by counsel who represented her at trial were lodged. The decision to refuse severance and permit the prosecution to adduce the evidence of the appellant's verbal admissions while drunk were criticised. Leave to appeal was refused by the single judge on 1st March 1994. The precise date when the appellant

instructed new solicitors is unclear, but on 29th April 1995 fresh counsel, Miss Shamash, was instructed to consider the existing grounds of appeal and advise on the merits of a new application. With the consent of the Registrar, counsel, together with a representative of the Prisoners' Welfare Organisation, visited the appellant in prison. She concluded that there was an arguable appeal raising issues distinct from the grounds on which leave had already been refused. In June 1995 she wrote a detailed advice seeking extension of legal aid on the basis that the case was "most unusual". Privilege has been waived. According to this advice the appellant alleged that her "trial solicitors advised her to pursue a defence which they knew to be untrue." There was said to be very considerable support for that account in the original case papers. The assertions that she told her solicitors and junior counsel that she had seen Doherty kill Mrs Taylor were said to amount to fresh evidence. She had given these instructions after committal and before trial. Her solicitor told her that it would be a bad idea to say that she had seen Doherty killing Mrs Taylor and that "as things stood she would be acquitted." We note that at this stage her instructions were said to be that she was "sure" that she had not told leading counsel the truth. In other words, so far as he was concerned she never resiled from her instructions that she had not been present at the fatal struggle. Nevertheless, Miss Shamash advised that if these facts had been known to the defence team at trial it was inconceivable that her August 1992 statements would have been excluded, and further, the October 1992 interview would have been edited.

We cannot minimise the seriousness of an allegation that counsel, whether leading or junior, or solicitors, had deliberately ignored the instructions of their client, not about the way in which her defence should be conducted (which is normally a question for the expertise and professional judgment of counsel), but about the crucial facts of her case (which provide the only basis of the defence to be advanced by counsel at trial). By failing to draw this material to the attention of leading counsel (in the case of the solicitor avowedly, and in the case of junior counsel by acquiescence) they had permitted leading counsel to advance McGregor's case on a basis which they knew from her fresh instructions was untrue.

In July legal aid was extended to include a full psychiatric assessment of the appellant, together with investigation into the fresh evidence that she had told her solicitor and junior counsel the truth but that neither she nor they had ever disclosed it to leading counsel. The appellant's new solicitors asked her previous solicitors for the file of

correspondence and papers to be passed to them. Having received the file they were then concerned that certain items were missing, including counsel's brief as well as attendance notes made during the course of the proceedings before the magistrates and at the police station. After delay these papers were eventually disclosed. On 29th January 1996 the new solicitors commented that there did not appear to be "any actual notes of what took place during these attendances" or attendance notes made during "all conferences and attendances" together with the trial brief.

Although we are unimpressed by the dilatory way in which the appellant's former solicitors appear to have responded to the request made by new solicitors, we note that it was not until 13th February 1996 that any letter was sent to the appellant's former solicitors, or her counsel, containing any indication that the prime issue "freshly" identified by the appellant when she saw her new legal advisors was that her former solicitors and junior counsel had been told the truth and that the solicitor had positively discouraged her from revealing it. To our surprise we can find nothing in this correspondence until then which suggests that the conduct of former solicitors or indeed counsel was being impugned, although the assertion had first been made very many months before.

On 8th February leading counsel, Lord Richard QC, was faxed and invited to be kind enough to forward his notes of conference and evidence. He responded immediately to the effect that if there were no notes in the brief they would have been thrown away. He said he would check with his junior.

Junior counsel was also approached by Miss Shamash. The letter to him dated 13th February indicates that although the appellant was clear that she had never told the "truth" to Lord Richard, he, junior counsel, "may" - a significant gloss on the allegation in the earlier advice - have been present when she told her solicitor that she had been at the scene. The positive assertion that he was present was never put to him. Nevertheless he was asked a series of detailed questions relating to the conduct of the case. In effect he was interrogated. He responded that he had seen the appellant once in conference with his leader and solicitor on 24th September 1993. He did not recollect any instructions based on duress by or fear of Doherty, nor could he recall all the discussions at trial between his leader and leading counsel for Doherty. In relation to conversations in August 1992 he commented that Lord Richard "took the view that a neutral position was best in the circumstances". Finally he was asked about the outcome of any conference dealing with the question of the appellant giving evidence. He recorded that Lord Richard had kept their client informed about what was

happening and fully discussed the question of her giving evidence.

On 13th February Lord Richard was similarly interrogated about the conduct of the defence, without any allegation being put to him. He made no further response and he was not invited to comment again.

A similar letter was written on the same date to the former solicitors. It was asserted that the appellant had told them the "truth". They responded that they had never been told until after the conclusion of the trial that Doherty was responsible for Mrs Taylor's death and that she, McGregor, had played no part in it. Her instructions to them were that both she and Doherty were innocent. Mrs Taylor died from natural causes. It was not until after conviction that the appellant indicated that Doherty "killed Sheila Taylor".

The notice of appeal is dated 28th February 1996. Among other grounds it is alleged that the appellant maintained that she told her solicitor before trial that she had been present when Doherty killed the deceased. However, she blamed her fear of Doherty, not the optimism of her solicitors, for her failure to put forward this defence.

On 24th June leave to appeal was granted. The view of the court expressed by Lord Bingham of Cornhill, Chief Justice, was that the severance point was arguable. Nothing was said by Miss Baird to suggest that trial counsel would be criticised. An application for further legal aid to investigate the psychiatric implications of the case was unsuccessful.

On 29th November we began the hearing of these appeals. When the case was called on we invited counsel to inform us of the issues which arose for decision. Although Miss Baird referred to the Clinton point, we did not understand her to say that the conduct of trial counsel was to be criticised. However, after we had heard full argument by counsel for Doherty and Miss Baird had concluded her submissions on severance, she then turned to develop her argument and we began to appreciate that she did indeed intend to criticise trial counsel. There were no relevant written grounds of appeal nor was the correspondence with trial solicitors and counsel referred to earlier in this judgment before us. Miss Baird identified the points she wished to argue and, over lunch, reduced them to writing. They read:

> "35a. The decision to remain neutral as to the exclusion of the appellant Miss McGregor's statements in August 1992, that Doherty killed Mrs Taylor, was a decision made contrary to all promptings of reason and good sense, in that, once the appellant's confession had been ruled admissible, her interests required those assertions to be put before the jury with the aim of undermining the reliability of that

confession.

35b. The decision to advise the appellant, Miss McGregor not to give evidence was a decision made contrary to all the promptings of reason and good sense in that it was her case that her admission was untrue and without her evidence as to how it came to be made it remained unexplained before the jury."

These new criticisms are of course directed not so much at the former solicitors but at trial counsel. They were not supported by any affidavit or even a signed statement from the appellant. They are a very long way indeed from what originally was the most serious allegation, namely that her solicitor, and possibly junior counsel, did not advance the appellant's case in accordance with her account of events.

Neither Lord Richard nor his junior had ever been notified of these particular allegations against them. We are not concerned to protect counsel from justified criticism of their conduct if their incompetence has resulted in a miscarriage of justice. But whatever the conclusion to which the court might eventually come, we regard it as elementary that any such criticisms should have been clearly formulated and unequivocally made to counsel before they were advanced in court and that counsel should have had a fair and reasonable opportunity to deal with them.

We adjourned the hearing, requiring a waiver of privilege by the appellant, the production of a written signed statement from her in seven days, together with all the earlier correspondence with solicitors and trial counsel. Questions of costs were reserved.

The adjourned hearing took place on January 24th 1997. Having provided us with a written statement of relevant events Lord Richard and Mr Lee Karu (his junior at trial) attended as we had requested. In his written account Lord Richard dealt with each ground of criticism. He confirmed that "at no time during the trial was I, nor was my junior, aware of the defence that Miss McGregor is now advancing as the truth. Our instructions were that she knew nothing about the circumstances in which Mrs Taylor met her death". He went on "I do not see therefore, how it would have been possible for us to run two contradictory defences, namely she knew nothing about it but if she did it was all Doherty's doing." He then dealt with the decision that McGregor should not give evidence. This was "fully discussed with the client. I took the view that she would make an appalling witness and that she was open to considerable dangers in cross-examination over the Fumagalli incident. My recollection is not only that the client agreed that it was better for her not to go into the box, but that she was anxious to avoid giving the evidence."

Without disrespect to him it is unnecessary to quote from the account given by junior counsel, save that he confirmed that "at the end of the prosecution case my leader in the presence of myself and instructing solicitors fully advised Susan McGregor as to her right to give evidence and the state of the evidence as it stood."

The question whether the appellant's true instructions had been hidden from leading counsel and the court appeared to remain a live issue, but it was difficult for us to a appreciate the precise extent to which it would be relied on for the purposes of the appeal. To begin with Miss Baird focused her argument on the appellant's failure to give evidence. She relied on the proof prepared for trial and the notes of the relevant consultation taken both by junior counsel and his instructing solicitors to demonstrate what she described as a "fixed view" in the mind of leading counsel that never changed throughout the trial. Miss Baird told us at that stage that she was not alleging that her client was deprived of the opportunity to give evidence and that "it would be fair to say she was reluctant to give evidence." She also said that she had been told by Lord Richard, and accepted, that he saw the appellant virtually daily throughout the trial. Nevertheless she suggested that his failure to advise his client to give evidence was contrary to all the promptings of reason and good sense. She pointed out that McGregor could have explained her admissions to the police and her involvement in the misuse of Mrs Taylor's pension book. The appellant's conversations with the police in August 1992, suggesting that she had been present when Doherty killed Mrs Taylor, should have been put before the jury. This would have undermined any confidence the jury might have in the admissions to the police that she had personally been involved in the killing.

Thereafter the submission developed by referring to the failure of the appellant's legal advisors to investigate in detail a number of aspects of the case including such matters as the violence to which Doherty had allegedly subjected the appellant and her "learned helplessness", all of which might serve to demonstrate why she would be reluctant to blame Doherty for his responsibility for Mrs Taylor's death. Two themes recurring during the submission were the nature of the appellant's true defence and her relationship with Doherty. In mid afternoon, after a number of promptings from the court, we received the written statement made by the appellant. It is very brief. It is silent on the subject whether she had told her solicitors the "truth", although it does refer to her solicitor having been "always very confident" that she would be acquitted. Eventually, after we had underlined that there was no evidence from her about

the matters forcefully canvassed on her behalf, the appellant was called to give evidence. We did not believe her. In particular we rejected her evidence first that she had told her solicitors the "truth", namely that she had been present at the killing for which Doherty alone was responsible, and second, that she was not seen by Lord Richard and his junior during the trial to discuss whether or not she should give evidence. She alleged that Lord Richard had never talked to her about this subject. She had not wanted to give evidence, but if she had been told that her freedom depended on it she would have gone into the witness box. If so, in answer to a question from Mr Mitchell about which account she would have given to the jury, after a short silence, she replied that she did not know.

After the appellant had given evidence Lord Richard and Mr Karu gave evidence before us. Mr Jayatilaka, her former solicitor, gave evidence this morning. They confirmed what they had set out in their written statements. We unhesitatingly believe them. In view of the length of this judgment we must focus on three features of the evidence at trial. The cause of Mrs Taylor's death remained a serious issue dependent on expert evidence and the jury's assessment of it. Second, counsel's clear instructions were that although they were "together", neither the appellant nor Doherty had been present when Mrs Taylor died. Third, counsel had no instructions which would have justified the running, if we may use the colloquial description, of a cut-throat defence, blaming Doherty for the death of Mrs Taylor, or indeed alleging ill-treatment of McGregor by him. For Lord Richard to have introduced before the jury admissions made by the appellant that she had been present when Doherty had killed Taylor would have involved ensuring not only that evidence contrary to his own instructions was before the jury, but would inevitably have made it easier for the jury to conclude that Mrs Taylor's death was indeed the result of homicide and not natural causes. Moreover, the inclusion of these admissions in order to undermine the jury's confidence in the admissions which were put before them would have made it that much more likely that the appellant would have been required to give evidence and if so open to cross-examination not only by the Crown but by Doherty. Even with hindsight we believe that if the course now suggested by Miss Baird had been taken, the Crown's task of proving the appellant's guilt would have been made easier rather than more difficult.

The decision not to give evidence was made by the appellant. Counsel's duty is to ensure that the client appreciates that the decision is her decision, not counsel's, and second, to advise her about his view of the best course to be taken.

The advice depends on the individual circumstances of each case, and counsel's own judgment of the likely impact that the client would make as a witness and the potential damage which would follow cross-examination, and the extent to which the judge might comment unfavourably if the client did not give evidence. It is, however, not enough for counsel to consider the matters for which the client may have some explanation: he must consider those for which there is none or no satisfactory explanation, and the way in which any purported explanation may be undermined in cross-examination. Even if we can persuade ourselves to ignore that the appellant told us that she did not know which of her two inconsistent accounts would have been given if she had been called, we can simply say that having seen her briefly for ourselves we can well understand why Lord Richard could see no advantage in calling her to give evidence when she was reluctant to do so, and when there were a number of aspects of the evidence with which she would have had considerable difficulty. These included her own involvement in the misuse of Mrs Taylor's pension book, her lies on the subject, her repeated if inebriated submissions to the police which were inconsistent with the case she had put before Lord Richard, and Fumagalli's evidence of her involvement in the attack on him.

We do not propose to define the extent to which counsel should endeavour to persuade a client against her own clear reluctance to give evidence. If he did so, we have little doubt that he would then be criticised for having deprived her of the right to make her own decision. In the present case the appellant was given wise advice and made up her own mind not to give evidence.

This morning Miss Baird developed an argument based on the premise that McGregor's trial lawyers were remiss in failing to pursue the possibility of further psychiatric evidence which would help demonstrate that her admissions to the police should have been regarded as unreliable both by the judge when giving his ruling and, if he admitted them, by the jury, on the basis of her psychiatric condition as well as her alcoholism. Although we cannot recollect that this criticism was put to Lord Richard, his junior counsel and Mr Jayatilaka explained that the issue had been addressed by them and it was decided, after a discussion, according to Mr Karu, with Lord Richard's predecessor as leading counsel, that nothing would be gained.

Miss Baird put before us the report of Dr Adshead dated January 1996 as an example of the information which might have been obtained if further psychiatric evidence had been sought. We have read the report de bene esse. On

any other occasion we should have required evidence to be called. The significant feature of the report is that it depends on McGregor's new instructions rather than those that she gave to her former legal advisors. She blames Doherty for the murder of the deceased. She says that she was present and witnessed him killing her. She alleges very serious violence by Doherty against her which she asserted put her in great fear of him. All these details are set out graphically and in considerable detail.

The essential problem with this submission is simple. It depends on the case now being advanced by Miss McGregor. If these instructions had been given by her to her former solicitors and counsel they would then have been conducting a quite different defence. We anticipate that they might then have sought a further psychiatric report, and her defence would have involved a direct attack on Doherty. We have little doubt that the jury would then have heard all her admissions. They would have been invited to set the case advanced on her behalf with the persistent, and on this basis, wholly untruthful denials in her interviews on 19th October 1992. Perhaps most important of all, the possibility of an acquittal on the basis that death may possibly have resulted from natural causes rather than homicide would simply have disappeared. None of this could have been avoided if the issue now taken that her admissions should have been rejected by the court because of her psychiatric condition had been advanced.

We are not prepared to countenance criticism of former counsel and solicitor on the basis that they might have prepared the case differently for trial if their instructions from their client about the facts had been different.

At the risk of spelling out the obvious, trial counsel must conduct a case in accordance with the client's instructions about the relevant facts. Of course it may be necessary for counsel in conference to test those instructions, to give advice where appropriate as to the plausibility of the client's account, and to consider all the other factual material which may suggest that the client's account could be wrong. Even so, the utmost care has to be taken to avoid the danger that a client may adapt his defence according to his understanding of what he believes counsel may be suggesting from his point of view would be a different and more convenient set of facts. Where counsel has properly explored the possibility that there may be some other factual basis other than that asserted by the client, and has received clear instructions about the defence, it is not then open to him to construct a case or prepare for trial on some other factual basis. Accordingly, a suggestion that counsel who conducted the case in accordance with his instructions

should nevertheless have anticipated some other defence based on different facts is one that will almost certainly fail.

In our judgment the criticisms of trial counsel in this case are without foundation. In our judgment they should never have been advanced.

In R v Ram (unreported) 24th November 1995, Beldam LJ observed:

"There seems to be an increasing tendency to believe that it is only necessary to assert the fault of trial counsel to sustain an argument that the conviction is unsafe or unsatisfactory."

In our experience this trend has continued, wrongly - as this case shows - to accelerate.

Following decisions of this court in R v Clarke and Jones, 29th July 1994, and R v Bowler, 5th May 1995, in both of which criticisms were made of trial counsel, guidance was given in December 1995 by the Bar Council with the approval of the Lord Chief Justice about the procedure to be adopted in criminal cases which involve criticism of former counsel. In the context of the present appeal we highlight this guidance and add some further observations which, together with the guidance, also apply when criticism is directed at former solicitors. The guidance provides:

> "1. Allegations against former counsel may receive substantial publicity whether accepted or rejected by the court. Counsel should not settle or sign grounds of appeal unless he is satisfied that they are reasonable, have some real prospect of success and are such that he is prepared to argue before the court (Guide to proceedings in the Court of Appeal Criminal Division para 2.4). When such allegations are properly made however, in accordance with the Code of Conduct counsel newly instructed must promote and protect fearlessly by all proper and lawful means his lay client's best interests without regard to others, including fellow members of the legal profession.
>
> 2. When counsel newly instructed is satisfied that such allegations are made, and a waiver of privilege is necessary, he should advise the lay client fully about the consequences of waiver and should obtain a waiver of privilege in writing signed by the lay client relating to communications with, instructions given to and advice given by former counsel. The allegations should be set out in the Grounds of Application for Leave to Appeal. Both waiver and grounds should be lodged without delay; the grounds may be perfected if necessary in due course.
>
> 3. On receipt of the waiver and grounds, the Registrar of Criminal Appeals will send both to former counsel with an invitation on behalf of the court to respond to the allegations made.
>
> 4. If former counsel wishes to respond and considers the time for doing so insufficient, he should ask the Registrar for further time. The court will be anxious to have full information and to give counsel adequate time to respond.
>
> 5. The response should be sent to the Registrar. On receipt, he will send it to counsel newly instructed who may reply to it. The grounds and the responses will go before the single judge.

> 6. The Registrar may have received grounds of appeal direct from the applicant, and obtained a waiver of privilege before fresh counsel is assigned. In those circumstances, when assigning counsel, the Registrar will provide copies of the waiver, the grounds of appeal and any response from former counsel.
>
> 7. This guidance covers the formal procedures to be followed. It is perfectly proper for counsel newly instructed to speak to former counsel as a matter of courtesy before grounds are lodged to inform him of the position."

Nothing in Clinton or the subsequent authorities suggests that grounds of appeal based on the criticism of trial counsel may be sustained on the basis that new counsel, with the luxury of hindsight and without the responsibility for conducting the trial in accordance with his client's instructions, feels able to argue that the conduct of the case might reasonably have been different. Unless in the particular circumstances it can be demonstrated that in the light of the information available to him at the time no reasonably competent counsel would sensibly have adopted the course taken by him at the time when he took it, these grounds of appeal should not be advanced. In Clinton itself it was emphasised that the circumstances in which the verdict of a jury could be set aside on the basis of criticisms of defence counsel's conduct would "of necessity be extremely rare." In fact fresh counsel are becoming all too ready to formulate criticisms of trial counsel by adopting some of the language used in Clinton and Fergus without carefully analysing the difficulties which faced counsel under the immediate pressure of the trial process, and without approaching the instructions given by the client to fresh counsel, after conviction, with a reasonable degree of objectivity. Unless these features are kept firmly in find it is difficult to see how fresh counsel could decide that grounds of appeal based on criticisms of trial counsel could possibly be "reasonable" and enjoy "some real prospect of success".

Moreover, counsel's duty fiercely to promote and protect his lay client's interest (which we endorse) and the fact that he is prepared to argue the appeal, do not of themselves justify the conclusion that the grounds of appeal are "reasonable" and have "some real prospect of success". The distinctions between these various considerations should not be elided.

Finally, in cases where the allegations against counsel are based on alleged non-compliance with or disregard of the client's express instructions (whether as to fact or about the conduct of the case) unless the client has significant educational impairment, it is difficult to envisage circumstances in which fresh counsel may regard it as "reasonable" to draft grounds of appeal without at the very least being in possession of a signed statement of the facts alleged by the

client together with an unequivocal signed waiver of privilege. The client should also be advised that allegations based on what has allegedly passed or failed to pass between the client and trial counsel are unlikely to carry any weight with the court unless they are supported by oral testimony.

The precise complaint should be spelt out with clarity in the grounds of appeal. The grounds, together with the waiver of privilege and where appropriate the statement of facts and any request for former counsel to provide documents or similar material, should be lodged with the Registrar without delay. He will supply all relevant material to trial counsel who should then respond in accordance with the guidance.

The purpose of the "courtesy" referred to in the guidance is to inform trial counsel of the allegations which are to be made. It is not to be treated as an opportunity to cross-examine or interrogate him, whether before the grounds of appeal and necessary documents have been lodged with the Registrar, or after counsel has responded. Where there is a factual dispute between a client and former counsel both the appellant and counsel may be required to give evidence so that, unless agreed, issues of fact may be resolved. The opportunity for cross-examination arises at that stage.

These appeals are dismissed.

MISS BAIRD: My Lord, I am sure I ought to remind you that you reserved the questions of costs for the November hearing. It is at page 2 of the transcript of that date.

LORD JUSTICE JUDGE: Miss Baird, we have considered that. May I tell you what we are minded to do, and then you must have an opportunity to address us. Your client is legally aided. What we are minded to do is to instruct the Taxing Officer that in our judgment, but it is for him to decide in the end, this case really should have been completed within two days rather than the two-and-a-half or three (as we now are) which it has taken, and to make whatever order in his discretion when he taxes your side's costs that he deems appropriate in that context. Do you want to say anything about that?

MISS BAIRD: I should prefer probably to make written representations to that officer.

LORD JUSTICE JUDGE: Absolutely. You are entitled to make any written representations which you think right. Mr Ford, I have nothing to say in relation to your costs; you are here because you had to be here.

MR FORD: I am grateful.